

## APPEAL NO. 93049

On November 2, 1992, a contested case hearing was held in (city), Texas with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). The issues at the hearing were whether a (date of injury) injury resulted in the death of (claimant), the deceased, and whether the respondent (herein the carrier) waived its right to contest the compensability of a (date of injury) injury to the deceased for failure to timely contest the injury under Article 8308-5.21. The hearing officer determined that the compensable injury of (date of injury) did not result in the death of the deceased, and that the carrier timely contested whether a compensable injury resulted in the death of the deceased after the claimant, who is the surviving spouse of the deceased, filed a claim for death benefits. The hearing officer also held that Article 5.21 did not apply to the facts of this case. The claimant disputes certain findings of fact and conclusions of law and requests that we reverse the hearing officer's decision that Article 8308-5.21 does not apply to the facts of this case. The claimant further requests that we render a decision that the carrier failed to timely contest the claimant's claim for death benefits, or in the alternative, render a decision that the deceased's compensable injury of (date of injury) resulted in his death and that the carrier is liable for death benefits. The claimant also requests, in the alternative, that we reverse the decision of the hearing officer and remand the case for further consideration and development of the evidence. The carrier's response was filed within the time limit for filing a request for review. The carrier disagrees with certain findings of fact and a conclusion of law. The carrier asserts that if Article 8308-5.21 applies to this case, then it did timely contest the claimant's claim for death benefits. The carrier further contends that the evidence supports the hearing officer's decision that the deceased's injury did not result in his death and that the claimant is not entitled to death benefits.

## DECISION

The decision of the hearing officer is modified to reflect that Article 8308-5.21 does apply to this case, and as modified, the decision is affirmed.

The deceased stepped on a nail while inspecting a construction site on (date of injury). The nail punctured his right foot. The onset of Hepatitis B was detected by the deceased's family physician, Dr. V, on January 24, 1992. On January 31, 1992, the deceased was admitted to the hospital where he died on February 8, 1992 of hepatic failure, secondary to Hepatitis B. After determining that no members of the deceased's family had Hepatitis B, that the deceased had not received any blood products, that the deceased had not been sexually active for some time, and that there was no history of drug abuse, Dr. V, opined on August 13, 1992 that:

It is probable that the nail, laying on the ground, was somehow contaminated with the Hepatitis B virus, particularly if the work site was near sewer lines. I have no way of knowing this, and I do not know of any way to verify this as the

mode of infection. I cannot determine any other route of possible infection. Given that no other mode of transmission has been determined, I feel that Mr. Teas probably contracted Hepatitis B from a puncture wound with a contaminated nail.

Dr. P, who is board certified in internal medicine and who specializes in internal medicine and infectious diseases, reviewed the deceased's medical records and discussed the deceased's medical history with Dr. V. He stated that "approximately 50% of people here in the United States contract Hepatitis B with no known high risk behavior." Dr. P gave the following answers to the stated questions in a deposition on written questions:

Question:Based on reasonable medical probability, do you believe that an incident of (date of injury) in which [the deceased]

stepped on a nail puncturing his right foot was a producing cause of any condition that lead to his death?

Answer:Based on reasonable probability, I do not know if the nail was a cause.

Question:Doctor, do you have an opinion whether or not, in the absence of other reasonable causal explanations explaining [the deceased's] contracting Hepatitis B, it is more likely than not that [the deceased] contracted Hepatitis B by stepping on a nail at work on (date of injury)? Please give your opinion.

Answer:Not likely but possible.

Pursuant to Article 8308-4.41, the carrier must pay death benefits to the legal beneficiary of the employee if the compensable injury results in death. In this case, the hearing officer determined that the deceased's compensable injury of (date of injury), did not result in the death of the deceased. In determining whether the evidence is sufficient to support the hearing officer's determination, we recognize that under Article 8308-6.34(e), the hearing officer is the sole judge of the relevance and materiality of the evidence offered, and of the weight and credibility to be given to the evidence. The hearing officer resolves conflicts and inconsistencies in the testimony of different witnesses, including expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App. - Houston [14th Dist.] 1984, no writ). It has been held that causal connection must rest in reasonable probabilities. Insurance Company of North America v. Myers, 411 S.W.2d 710, 711 (Tex. 1967). In Parker v. Employers' Mutual Liability Insurance Company of Wisconsin, 440 S.W.2d 43, 47 (Tex. 1969), the Supreme Court of Texas stated:

Plaintiff by inference raises the question of whether there can be a logical distinction

made between a reasonable medical "probability" and a medical "possibility." We think that such a distinction can be made. There can be many possible "causes," indeed, an infinite number of circumstances can cause an injury. But a possible cause only becomes "probable" when in the absence of other reasonable causal explanations it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue can be submitted to the jury.

As the hearing officer found in Finding of Fact No. 22, there was a difference of expert medical opinion about the causal relationship between the deceased's (date of injury) injury and his contracting hepatitis. Having reviewed the record, we conclude that the evidence is sufficient to support the hearing officer's Finding of Fact No. 23 that the deceased's (date of injury) nail puncture wound did not cause him to contract hepatitis and did not result in his death on February 8, 1992, and that such finding is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. See Texas Workers' Compensation Commission Appeal No. 92085, decided April 16, 1992; and Texas Workers' Compensation Commission Appeal No. 92093, decided April 24, 1992.

Article 8308-5.21(a) provides in pertinent part that, if the insurance carrier does not contest the compensability of the injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. Subsection (b) of that article provides for written notice of the injury. In regard to the issue of whether the carrier waived its right to contest compensability of the deceased's (date of injury) injury for failure to timely contest under Article 8308-5.21, the hearing officer made the following finding of fact and conclusion of law which are not disputed by either party on appeal:

**Finding of Fact No. 5.** [The carrier] did not controvert the 10 December 1991 injury described in the 12 December 1991 Notice of Injury within 60 days after 12 December 1991.

**Conclusion of Law No. 4.** Because: (i) the carrier did not contest the compensability of [the deceased's] 10 December 1991 injury within sixty (60) days after receiving notice on 12 December 1991; and (ii) there is no newly discovered evidence to contest the compensability of [the deceased's] 10 December 1991 injury, the carrier has waived its right to contest the compensability of [the deceased's] 10 December 1991 injury under the provisions of Article 8308-5.21(a).

Although the parties agreed at the hearing that the issue was whether the carrier timely contested the injury of (date of injury), it is evident from the hearing record, other findings of fact and conclusions of law, and the request for review and the response, that

the parties were actually litigating whether the carrier had timely contested the claimant's claim for death benefits. The claimant's position was that the carrier had notice of the claim for death benefits as early as February 13, 1992 and failed to contest the claim within 60 days. The carrier's position was that it did not receive written notice of the claim for death benefits until June 5, 1992, and timely contested the claim on June 19, 1992. The parties essentially agree with the hearing officer's statement of evidence which we set forth in the next two paragraphs.

Ms. Z said she was the adjustor for the carrier. Ms. Z said she first handled a claim, not an issue in this proceeding, involving the deceased's January 14, 1992 hernia. Ms. Z said when she asked the doctor about the deceased's scheduled hernia surgery she learned he was in the hospital with hepatitis. Ms. Z said she talked with Mr. D (who is the deceased's son-in-law) on February 6, 1992. He said that the deceased's stepping on a nail on (date of injury) may have caused the deceased's hepatitis. Ms. Z said Mr. D sent her a medical authorization for the deceased to release the deceased's medical records to Ms. Z. Ms. Z said that on February 12, 1992 she knew that the deceased passed away on February 8, 1992. Ms. Z said that on February 25, 1992 she got the deceased's medical records from his hospitalization for hepatitis. (These records consisted of two pages of handwritten notes which are, for the most part, illegible). Ms. Z said that on March 9, 1992 she again spoke with Mr. D. Ms. Z said that she did not recall the exact conversation with Mr. D but remembered Mr. D told her he believed that the deceased's death was a result of him contracting hepatitis from a nail puncture on (date of injury). Mr. D faxed her a copy of the deceased's death certificate that day. Ms. Z said on March 9, 1992, she did not know of any beneficiary making a claim for the death benefits based on the deceased's (date of injury) compensable injury. Ms. Z never talked to the claimant. Ms. Z said the carrier received a June 5, 1992 Texas Workers' Compensation Commission (Commission) letter notifying the carrier that the Commission received a death claim filed by the claimant. Ms. Z said on June 19, 1992 she filed a controversion to the death benefits claim of the claimant. Ms. Z said she then contacted Dr. P, and based on his report, filed a subsequent controversion on August 17, 1992.

Mr. D said that he is a vice-president of a major insurance agency and is a son-in-law of the deceased and the claimant. He said he helped the claimant, but he did not act on her behalf under a power of attorney, and he was not a legal beneficiary of the deceased. Mr. D did not indicate in any way that he was an officer, director, or had any position with the employer. Mr. D said that he talked with the carrier regarding the deceased's illness and death a number of times. On February 6, 1992, Mr. D faxed to Ms. Z the deceased's medical release so the carrier could obtain the medical records to relate the deceased's (date of injury) injury to his January 31, 1992 hospitalization. After the deceased's death, Mr. D saw Dr. P, who told him that the deceased's hepatitis could have been caused by stepping on a nail. Mr. D said on March 9, 1992, he told Ms. Z that the deceased's death was a result of hepatitis he contracted in his (date of injury) injury. Mr. D said Ms. Z told

him such a claim was a long shot. Mr. D faxed Ms. Z a copy of the deceased's death certificate that day. Mr. D said he believed he represented the deceased's family interest as of February 13, 1992, that a claim for death benefits could be made in the matter, and that when the carrier received the deceased's death certificate on March 9, 1992, the carrier was on notice of a claim for death benefits.

The hearing officer made the following findings of fact and conclusions of law:

### **FINDINGS OF FACT**

**No. 9.** On 6 February 1992 Mr.D faxed to [the carrier] the deceased's medical authorization allowing the carrier access to the deceased's medical records maintained by Dr. V.

**No. 10.** Mr. D is the son-in-law of [the deceased and the claimant]. Mr. D is not an owner, principal, or employee of [the employer]. Mr. D is not the executor of [the deceased's] estate. Mr. D is not authorized to represent [the claimant] in any claim before the Commission. Mr. D is neither an agent for [the employer or the deceased] nor an agent for [the claimant].

**No. 11.**On 8 February 1992 [the deceased] died.

**No. 12.**On 11 February 1992 the coroner issued a death certificate related to [the deceased's] death. The death certificate listed the cause of death as Hepatitis (sic) failure and gave as causes hepatic necrosis and Hepatitis B. The death certificate did not list an on-the-job injury as the cause of hepatitis.

**No. 13.**On 12 February 1992 the carrier requested the medical records from Dr. V related to [the deceased], to determine if the carrier was liable for [the deceased's] hospitalization. The carrier received the records on 25 February 1992.

**No. 14.**The carrier knew as of 12 February 1992 that Mr. D claimed that [the deceased's] death was a result of [the deceased's] 10 December 1991 injury.

**No. 15.**On 9 March 1992 Mr. D faxed [the deceased's] death certificate to the carrier, and again told the carrier that he believed [the deceased's] death was related to his 10 December 1991 injury.

**No. 16.**[The employer] did not file any notice with the carrier related to [the deceased's] death other than the notices it filed related to a 10 December 1991 injury and a 14 January 1992 injury.

**No. 17.**[The claimant] was the wife of the deceased.

**No. 18.**On 15 May 1992 [the claimant] filed a claim for death benefits with the Commission but did not file a copy of her claim with the carrier.

**No. 19.**On 5 June 1992 the Commission sent written notice to the carrier that the Commission received a written claim for death benefits from [the claimant].

**No. 20.**On 5 June 1992 the carrier first received written notice that either [the employer] or a beneficiary claimed that [the deceased's] 8 February 1992 death was a result of his 10 December 1991 compensable injury.

**No. 21.**On 19 June 1992 the carrier filed a TWCC-21 in which it controverted the claim for death benefits related to the death of [the deceased] stating: The 12-10-91 injury was a medical only with no lost time. There is no medical relating the claimant's death on 2-8-92 to the claimant's injury on 12-10-91 our investigation continues.

### **CONCLUSIONS OF LAW**

**No. 6.** Under the stipulated facts [the claimant] is a legal beneficiary for purposes of death benefits under Article 8308-4.41, Article 8308-4.42, and Article 8308-4.43, and her entitlement to death benefits, within the meaning of Article 8308-4.23(a), began on 9 February 1992.

**No. 7.**Because (i) the carrier disputes there is a causal relationship between [the deceased's] compensable injury on 10 December 1991 and his death on 8 February 1992; and (ii) the carrier is not contesting the compensability of [the deceased's] 10 December 1991 injury, the time limits of Article 8308-5.21(a) do not apply.

**No. 8.**Because: (i) the carrier first had written notice on 5 June 1992 that [the claimant], the legal beneficiary, was claiming death benefits alleging that [the deceased's] 10 December 1991 compensable injury resulted in his death; (ii) the carrier notified the beneficiary

on 19 June 1992 that it was not liable for death benefits because [the deceased's] 10 December 1991 injury did not result in his death; (iii) the carrier had a legitimate reason to dispute whether the 10 December 1991 injury resulted in the employee's death; and (iv) where the time limits of Article 8308-5.21(a) do not apply, the carrier has not waived its right to contest its liability for death benefits on the basis that the compensable injury did not result in death, within the meaning of Article 8308-4.41, when it controverts a claim within a reasonable period of time, after a beneficiary claims death benefits.

**No. 9.** Because [the claimant] has not shown by a preponderance of evidence that [the deceased's] 10 December 1991 compensable injury resulted in his death, within the meaning of Article 8308-4.41, on 8 February 1992, the carrier is not liable for death benefits under Article 8308-4.41.

We agree with the claimant's contention that the hearing officer erred in concluding in Conclusion of Law No. 7 that the time limits of Article 8308-5.21(a) do not apply to this case. In our opinion, the 60-day time limit for contesting compensability as set forth in Article 8308-5.21(a) applies to a claim for death benefits through the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(b) (Rule 124.6(b)), which provides as follows:

(b)The carrier must file the notice described in subsection (a), for payment of temporary income or lifetime income benefits, no later than the 7th day following receipt of written notice of injury. However, compensability of a death shall be contested no later than sixty days after the carrier has received written notice of a death, as set forth in Sec. 124.1 of this title (relating to Written Notice of Injury Defined). When compensability of a death is not contested within this time period, the carrier shall begin payment of death benefits no later than the Seventh day after the carrier has received proof of eligibility from a beneficiary (as required by Sections 132.2 through 132.6 of this title) [we omit the section titles] unless the carrier files the notice described in subsection (a) of this section. A carrier who files such notice later than the 60th day after a carrier received written notice of a death may not raise an issue of compensability, but is limited to contesting issues related to the status of the claimant as a legal beneficiary of the deceased employee, or the amount of benefits due to the claimant.

We disagree with the claimant's contention that the hearing officer erred in concluding in Conclusion of Law No. 8 that the carrier has not waived its right to contest the

compensability of the deceased's death. Rule 124.6 clearly sets forth the requirement that compensability of a death shall be contested no later than 60 days after the carrier has received written notice of a death, as set forth in Rule 124.1. Rule 124.1(a) provides as follows:

(a)Written notice of injury, as used in the Texas Workers' Compensation Act (Act), Sec 5.21, consist of the insurance carrier's earliest receipt of:

- (1)the employer's first report of injury;
- (2)the notification provided by the Commission under sub-section (c) of this section; or
- (3)any other written document, regardless of source, which fairly informs the insurance carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and facts showing compensability.

As found by the hearing officer in Finding of Fact No. 20, which finding is not disputed on appeal, on June 5, 1992 the carrier first received written notice that either the employer or a beneficiary claimed that the deceased's February 8, 1992 death was a result of his (date of injury) compensable injury. In Finding of Fact No. 21, which finding is also not disputed on appeal, the hearing officer found that on June 19, 1992, the carrier filed a TWCC-21 in which it controverted the claim for death benefits related to the death of the deceased. Thus, the uncontested findings establish that the carrier contested the compensability of the claimant's claim for death benefits within the 60-day time period provided for in Article 8308-5.21(a) as that time limit is applied to death benefit claims through Rule 124.6(b). We disagree with the claimant's assertion that, since the carrier indicated in its TWCC-21 dated June 19, 1992 that it first received notice of injury on December 26, 1991, that the carrier had 60 days from December 26, 1991 to contest the claim for death benefits. Obviously, no notice of the deceased's death could have been given to the carrier on December 26, 1991, because the deceased died on February 8, 1992. We also disagree with the claimant's assertion that the death certificate constituted written notice of the claimant's claim for death benefits, because the death certificate merely listed the cause of death as hepatic failure and Hepatitis B and did not relate any facts showing compensability as required by Rule 124.1(a)(3). Mr. D conversations with the carrier's representative on February 12th or 13th and on March 9th did not constitute a written notice of injury as defined in Rule 124.1(a).

The claimant contends that Findings of Fact Nos. 10, 14, and 15 should be revised to show that Mr. D represented the claimant. Such revisions, even if made, would not affect our decision that the carrier timely disputed the claimant's claim for death benefits, because



Mr. D did not give written notice of the claim, as written notice is defined in Rule 124.1(a), to the carrier until June 5, 1992.

Having determined that there is sufficient evidence to support the hearing officer's determination that the claimant's (date of injury) injury did not cause him to contract hepatitis and did not result in his death on February 8, 1992, and further determining that the hearing officer was correct in concluding that the carrier had not waived its right to contest compensability for death benefits (although we disagree with that part of his conclusion that Article 8308-5.21(a) did not apply), it is our opinion that the hearing officer did not err, contrary to the contention of the claimant, in concluding that the carrier is not liable for death benefits.

The carrier contends that the evidence was not so clear that it had notice that a claim for death benefits would be made prior to June 5, 1992 as set forth in Findings of Fact Nos. 13, 14, and 15. While the carrier may have known as of February 12, 1992 that Mr. D claimed that the deceased's death was a result of the deceased's (date of injury) injury, the carrier, under the provisions of Rule 124.6(b), had 60 days from the date it received written notice of death, as written notice is defined in Rule 124.1(a), to contest compensability of the deceased's death. As found by the hearing officer, the carrier first received written notice on June 5, 1992, and contested compensability of the death on June 19, 1992. The contest of compensability was within 60 days of the written notice and was, therefore, timely.

The carrier takes exception to Conclusion of Law No. 6 to the extent that it indicates that the claimant was entitled to death benefits from February 9, 1992. The carrier points out that under Article 8308-4.41, a beneficiary is entitled to death benefits only if the compensable injury results in the death of the employee. We agree with the carrier's contention concerning Conclusion of Law No. 6, and that conclusion is modified to delete the language "and her entitlement to death benefits, within the meaning of Article 8308-4.23(a) (sic), began on 9 February 1992."

The decision of the hearing officer is modified to reflect in Conclusions of Law Nos. 7 and 8 that Article 8308-5.21(a) applied to the claimant's claim for death benefits through the provisions of Rule 124.6(b); that the carrier timely disputed the claimant's claim for death benefits and did not waive its right to contest compensability of the deceased's death, and is further modified to reflect the modification to Conclusion of Law No. 6 as set forth in the preceding paragraph, and as modified, the hearing officer's decision that the carrier is not liable for death benefits is affirmed.

---

Robert W. Potts  
Appeals Judge

CONCUR:

---

Joe Sebesta  
Appeals Judge

---

Philip F. O'Neill  
Appeals Judge